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Supreme Court of the United States

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No. 403

JACK FREDERICK McKART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR JACK FREDERICK McKART

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QUESTION PRESENTED.

Must a Selective Service registrant futilely exhaust administrative remedies, when his IV-A, sole surviving son, exemption has been terminated upon an erroneous interpretation of the law, in order to be able to challenge the validity of that termination in a criminal proceeding?

ARGUMENT.

(a)

ADMINISTRATIVE REMEDIES CONSTITUTED A FUTILE AND EMPTY FORMALITY.

The Government in its brief (R. Br. pp. 20-22)[1] seeks to interject a factual issue into the substantive question of whether the Petitioner is entitled to classification as a sole surviving son. This position has no support in the record. The National and State Directors determined that the eligibility for the classification was gone with the disappearance of the "family unit" (A. 12, 34-35, 64-66). "Family unit" was defined as being composed of father, mother and children (A. 66). On the basis of this interpretation by Selective Service, the existence of the grandparents was irrelevant[2]: "In determining whether any registrant is a sole surviving son, an official statement of service and a death report, together with a chronology of the family happenings, *beginning with the marriage of the parents,* help to remove assumptions that otherwise have to be made." A., p. 65 (Emphasis added). Therefore, Selective Service had determined, as a matter of law, that the non-existence of a father, mother and sister disqualifies a registrant for exemption as a sole surviving son. The issue is thus only one of statutory construction. The facts about the existence of

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(1) R. Br. refers to Respondent's Brief.

(2) In addition, the Government never raised the matter of the grandparents in its appellate brief in the Sixth Circuit Court of Appeals, and it should not be allowed to do so at this point.

grandparents would have had no influence whatsoever on the local or appeal board.

The Government also argues that the position taken by the National Director was not binding upon the State Appeal Board, which is under a duty to make a classification *de novo* (R. Br. p. 23). This contention flies in the face of the reality of the way in which the State Appeal Boards operate. As Justice Harlan so aptly stated recently:

> "The boards have no power to promulgate regulations, and are not expressly delegated any authority to pass on the validity of regulations or statutes. Such authority cannot readily be inferred, for the composition of the boards, and their administrative procedures, render them wholly unsuitable forums for the adjudication of these matters: local and appeal boards consist of part-time, uncompensated members, chosen ideally to be representative of the registrants' communities; the fact that a registrant may not be represented by counsel in Selective Service proceedings, 32 CFR §1624.1 (b), seems incompatible with the boards' serious consideration of such purely legal claims. Indeed, the denial of counsel has been justified on the ground that the proceedings are nonjudicial. *United States* v. *Sturgis*, 342 F. 2d 328, 332 (1965), cert. denied, 382 U.S. 879; cf. *United States* v. *Capehart*, 141 F. Supp. 708, 719 (1956); affirmed, 237 F. 2d 388 (1957), cert. denied, 352 U.S. 971." *Oestereich* v. *Selective Service Board No. 46*, this Term, decided Dec. 16, 1968, 37 LW 4056.

It is hardly likely that these Boards, composed and functioning in this manner, would take an independent stand on a purely legal question. Since the local board followed the interpretation of the National Director, the State Appeal Board would not do otherwise.

In *Sicurella* v. *United States*, 348 U.S. 385 (1954) this Court recognized that a State Appeal Board would not resolve a purely legal dispute independently, but would rather be controlled by a third party which the Board considered authoritative:

> "The report * * of the Department of Justice to the Appeal Board clearly bases its recommendation on petitioner's willingness to 'fight under some circumstances, namely in defense of his ministry, Kingdom Interests and in defense of his fellow brethren,' and we feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground." 340 U.S., at 392.

An even greater influence would obviously be exerted by the National Director.

The Government also contends that Petitioner's appeal might have reached the National Selective Service Board and that the Board is independent of the National Director in fact as well as theory (R. Br. pp. 23-24). This contention is based upon certain statistics regarding decisions made by the National Board, showing disagreement with the determination by the National Director and State Directors in a significant percentage of the cases. This position also suffers from a considerable departure from the reality of what happens in actual practice.

The statistics recited by the Government are not meaningful in the present cause, because they are not refined to show which of the cases involved disagreement with the State and National Directors on purely legal questions and which involved factual disputes. As far as anyone can discern, the instances of disagreement may

be nothing more than disagreement over the resolution of factual issues. Certainly, they do not show any independence of the National Board regarding purely legal questions.

At the same time, the Government implies that an appeal to the National Board is a real possibility, so that use of the appeal process was not "demonstrably futile." (R. Br. p. 24). As the Government acknowledges, an appeal can be taken to the National Board by the registrant himself only if the State Appeal Board has a dissenting vote. The rarity of this occurrence is documented by the statistics, which show that 479 split decisions were decided by the National Board from January 1, 1968, through June 30, 1968, while 119,167 appeals were taken to State Appeal Boards during fiscal 1967 (R. Br. pp. 15, 24). The only other method of having a case brought to the National Board is to have an appeal taken by the State Director or National Director, which was not conceivable in this case, given the legal interpretation of the statute by Selective Service. The possibility of having the appeal reach the National Board may not be "demonstrably futile," but must be considered to be practically futile.

In footnote 10 of its Brief (R. Br. pp. 20-21), the Government states that this cause ought to be returned to the lower courts for a decision on the statutory question, if this Court determines that the exhaustion doctrine was improperly applied here. In light of the fact that neither side has found any decisions on this question, this Court will ultimately have to resolve this issue. This Court has before it now all materials and argument necessary to determine the question. Remanding this matter would be an obvious example of "demonstrable futility."

(b)

THE ISSUE INVOLVED IS PURELY ONE OF LAW OR STATUTORY INTERPRETATION.

The Government contends that petitioner's disregard of, and failure to exhaust, established administrative processes precludes him from asserting a claim that his reclassification and subsequent induction order were in violation of an explicit statutory prohibition. In support of this contention it cites *Falbo* v. *United States*, 320 U.S. 549, and *Estep* v. *United States*, 327 U.S. 114.

As we pointed out in our brief (p. 15) *Falbo* and *Estep* simply do not apply to petitioner's case in that they, together, determined the point in the administrative process to which the registrant had to bring himself in order to challenge the factual basis of his classification. Since both cases involved factual determinations by local boards within the competency and jurisdiction of these boards, they are not applicable to petitioner's case which involves the violation of an explicit statutory prohibition by a local board. Thus, because of the very restricted question presented by petitioner's case, respondent's fears of the imminent collapse of the Selective Service System (R. Br. pp. 8, 9, 10, 15, 16, 17), should petitioner prevail, are unwarranted.

The Government's reliance on other cases to support its position is also misplaced. In *Oestereich* v. *Selective Service Board*, No. 46, this Term, decided December 16, 1968, this court allowed injunctive relief to a registrant whose local board deprived him of this statutory exemption (37 LW 4054). Though Oestereich first appealed administratively (which McKart did not), it would in-

deed be ironic to allow a person's statutory exemption more protection in an injunctive proceeding than it would have in a criminal proceeding.

On page 12 of its brief the Government attempts to distinguish *Wills* v. *United States*, 384 F. 2d 943 (C.A. 9) from petitioner's case by pointing out that a local board mailing error excused exhaustion in that case. However, our reliance on *Wills* is not based on that fact, but rather on what Judge Merrill said in considering defendant's constitutional objections.

> In the first place, appellant's objection to his classification was not addressed to the area of administrative judgment. It did not pose a question upon which courts, bowing to special expertise, would regard the administrative determination as final, save only where basis in fact is lacking. His objection, founded upon a claim of constitutional right, was one on which courts have little reason to defer to administrative determination. The exhaustion rule loses much of its force in this area. Cf., *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817, 825 (2d Cir. 1967). *Wills* v. *United States*, 384 F. 2d 943, 945 (C.A. 9)

This court in *Clark* v. *Gabriel*, No. 572, this Term, decided December 16, 1968, drew a similar distinction between a question of law or statutory right and a question of fact which is committed to administrative expertise for determination (37 LW 3217).

The Government relies on *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52 (R. Br. p. 14) to the effect "that an individual must exhaust his administrative remedies before requesting the judiciary to set aside an administrative determination which he thinks erroneous. . . ." However, in *Myers* the plaintiff sought in-

junctive relief and still had an administrative process, namely, the N. L. R. B., to go back to.[3] Whereas, petitioner has no administrative process that he can now resort to.

The Government then rightly points out in a quotation from Professor Jaffe that "the Judiciary will not lightly interfere with a job given to the Executive until it is clear that the Executive has exceeded its mandate." Jaffe, *Judicial Control of Administrative Action*, p. 425 (1965). (R. Br. pp. 14, 15) The Government further recognizes the validity of this principle of judicial intervention by citing two cases where this court excused exhaustion because the claims were that the administrative agencies had acted beyond their statutory jurisdiction. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562 and *Leedom* v. *Kyne*, 358 U.S. 184, 188 (R. Br. p. 22).

Yet, for some reason or another, the Government doesn't see this principle being applicable to Petitioner's case. However, this is precisely Petitioner's contention, that in reclassifying him I-A and ordering him to report for induction his local board acted beyond its statutory jurisdiction, because Section 456(o) of Title 50, App. specifies that ". . . the sole surviving son of such family (the father of which was killed in action) shall not be inducted. . . ." Thus, even the Government admits

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[3] Davis in his treatise on administrative law points out "that in at least seven cases the Supreme Court itself has passed upon questions of administrative jurisdiction without requiring exhaustion of administrative remedies . . ." (cf. 3 Davis, *Administrative Law Treatise*, Sec. 20.02 fn. 8 *et seq* (1958). And these were cases where injunctive relief was sought and exhaustion excused.

the validity of the principle sought to be applied to petitioner's case.

The Government then cites *Yakus* v. *United States*, 321 U.S. 414, to the effect "that failure to seek an administrative remedy may preclude a defendant from asserting certain defenses in a criminal case arising out of the same matter, even though administrative relief is no longer available." (R. Br. p. 17). However, there are significant differences between *Yakus* and petitioner's case.

In *Yakus* at pp. 429, 430 this court held that:

> The provisions of Section 204 (d), (of the Emergency Price Control Act) conferring upon the Emergency Court of Appeals and this Court "exclusive jurisdiction to determine the validity of any regulation or order," coupled with the provision that "no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation," are broad enough in terms to deprive the district court of power to consider the validity of the Administrator's regulation or order as a defense to a criminal prosecution for its violation.

No such exclusive grant of judicial jurisdiction exists under the Selective Service Act. Furthermore, *Yakus* was concerned with the validity of an administrative regulation, whereas petitioner's case involves the violation of an explicit statutory prohibition by the local board, a much more serious matter.

Likewise in *Lichter* v. *United States*, 334 U.S. 742, 791, 792 (R. Br. p. 14) this Court refused to allow petitioners there to raise the issue of excessive profits when they had failed "to resort to the Tax Court in the face of the express statutory provisions made for such administrative relief." In addition to the lack of express

statutory provisions here, petitioner is defending in a criminal proceeding, whereas Lichter was defending in a civil matter. And as Justice Murphy said in his dissent in *Falbo*: "Criminal punishment for disobedience of an arbitrary and invalid order is objectionable regardless of whether the order be interlocutory or final." *Falbo* v. *United States,* 320 U.S. 549, 558.

(c)

PETITIONER'S FAILURE TO REPORT TO TWO PRE-INDUCTION PHYSICAL EXAMINATIONS AND AN INDUCTION PHYSICAL EXAMINATION SHOULD NOT PRECLUDE HIM FROM ASSERTING THE INVALIDITY OF HIS RECLASSIFICATION AND SUBSEQUENT INDUCTION ORDER.

Finally, the Government urges that petitioner be precluded from attacking his reclassification because he failed to report for two pre-induction physical examinations and he failed to report to the induction center where he would have received a physical examination prior to induction (R. Br. p. 25).

First of all the petitioner has not been charged with willful failure to report for a pre-induction physical examination. Thus, that matter is not relevant to the issue in question, namely, the validity of his reclassification and subsequent induction order.

The order for the first pre-induction physical examination, set for April 21, 1964, was cancelled by petitioner's board when they classified him 4-A on July 27, 1964 (A. 4, 26). Since that order no longer exists, it cannot have any effect on the issues here.

As for the second order to report for a p.i.p.e.,[4] set for March 17, 1966, petitioner's file shows that this order was issued only after petitioner was re-classified 1-A on Feb-

[4] "p.i.p.e." hereinafter means pre-induction physical examination.

ruary 14, 1966 (A. 5). This order was issued pursuant to Selective Service regulation 32 C.F.R. 1628.11(b).[5] Had petitioner not been invalidly classified 1-A he never would have been ordered for a p.i.p.e. pursuant to that 1-A classification. Thus, to argue as the Government does, that petitioner's failure to take his p.i.p.e. precludes him from pointing out the invalidity of his re-classification, is to attempt to validate a patently invalid re-classification.

If petitioner's failure to take such an examination can bar his pointing out the invalidity of his re-classification, then it doesn't really matter if his re-classification was valid or invalid, because that re-classification will never be looked at in a court of law. Then, in effect, petitioner is going to jail, not because he was validly re-classified and subsequently disobeyed a valid induction order, but rather, because he simply failed to take a p.i.p.e. as ordered. So, though indicted and convicted for failure to report for induction on April 21, 1966, petitioner is really going to jail for failure to take a p.i.p.e. on March 17, 1966, a crime for which he was neither charged nor convicted.

Any rule of law (here, the exhaustion rule) which leads to such an anomalous and unfair result has to have something wrong with it. And the error of the exhaustion rule here lies in this. If petitioner's re-classification to 1-A was beyond the jurisdiction of his board and, therefore, invalid, it is the central issue before the Court. To attempt to pre-

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[5] 32 C.F.R. 1628.11(b) provides for the issuance of p.i.p.e. orders to registrants classified I-A. The Government argues (R. Br. P-29) that petitioner could have been ordered for a p.i.p.e. pursuant to 32 C.F.R. 1628.11(c) which provides for such examinations for registrants classified other than I-A, I-A-O, or I-O, provided the local board determines their induction may shortly occur. However, there was never any such determination in petitioner's case while he was classified 4-A. And it is quite clear that his being re-classified I-A on February 14, 1966, led to his being ordered for a p.i.p.e. set for March 17, 1966.

vent a consideration of this central issue by citing petitioner's failure to follow procedures consequent upon his invalid re-classification is to turn the nature of causality upside down.

If the local board is responsible for invalidly reclassifying petitioner, then why punish him for not doing what the local board never had any right or power to tell him to do? Why not, instead, hold the local board responsible for doing what they never had any right to do, namely, re-classify petitioner 1-A and order him to report for induction?

As the order to report for a p.i.p.e. was consequent upon an invalid re-classification to 1-A, that order is as invalid as the re-classification itself. The same argument follows for petitioner's failure to take an induction physical examination on April 21, 1966. If petitioner's induction order was invalid, then procedures consequent upon that order, e.g. the induction physical examination, were invalid as well.

The great irony of petitioner's case is that, although he is exempt by law from induction, the Government is attempting to imprison him for failing to take physical examinations whose sole purpose is to determine a registrant's fitness for induction.

Lastly, to argue, as the Government does, (R. Br. p. 27) that petitioner is not "aggrieved" until he has been physically examined misses the point. The petitioner was aggrieved at the point of re-classification, because only then could the local board order him for a physical examination, thus causing him to refuse on the basis of his convictions. Furthermore, being sentenced to prison for three years on the basis of an invalid re-classification and induction order would appear to be a rather severe form of "aggrievement."

CONCLUSION.

For the reasons heretofore set forth, Petitioner prays that the judgment of the District Court be reversed and that the indictment be dismissed.

Respectfully submitted,

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